



Case Western Reserve Law Review

Volume 23 | Issue 3

1972

Book Comment: The Closed Enterprise System: The Nader Study Group Report on Antitrust Enforcement, edited by Mark J. Green

Arthur D. Austin

Follow this and additional works at: <https://scholarlycommons.law.case.edu/caselrev>

 Part of the [Law Commons](#)

Recommended Citation

Arthur D. Austin, *Book Comment: The Closed Enterprise System: The Nader Study Group Report on Antitrust Enforcement*, edited by Mark J. Green, 23 Case W. Res. L. Rev. 678 (1972)

Available at: <https://scholarlycommons.law.case.edu/caselrev/vol23/iss3/9>

This Note is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Law Review by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

BOOK COMMENT

THE CLOSED ENTERPRISE SYSTEM: THE NADER STUDY GROUP REPORT ON ANTITRUST ENFORCEMENT. Edited by Mark J. Green. Washington, D.C. Pp. xiii, 1,148 (2 vols.). \$27.00.*

The most durable characteristic of antitrust is controversy. Businessmen shrilly espouse and commend antitrust as a charter of freedom, but grumble about discriminatory and heavy-handed enforcement. Commentators complain that at times antitrust statutes serve as conduits through which inapplicable a priori economic theories enter, with deleterious consequences, the mainstream of the competitive process. John Kenneth Galbraith recently made more waves by announcing that antitrust is obsolete, or at best negligible in today's technostucture.¹ Decreeing that antitrust is "relevant" and on a par with the high profile fields of poverty and ecology, a small group of Ralph Nader associates now tailgate the procession with an investigation of "the policies and procedures, the politics and personalities which comprise the empirical reality of antitrust enforcement."² The purported findings of their two-volume, 1,148-page study can best be summarized as an indictment: the corporate establishment, aided and abetted by the mis- and non-feasance of Government, is wreaking havoc with the consumer and the economy, while simultaneously subverting the nation's social and moral ethic.

Whatever the merits of the previous Nader Raider books,³ *The Closed Enterprise System* is an unsatisfactory piece of work. In the strain to validate the charges, bias and overkill devour credibility and balanced analysis. A self-perpetuating necessity to satisfy an unsatiated constituency addicted to the Nader style of muckraking propels the authors into the realm of sweeping headline denunciation. Such a consequence of constituency politics is inevitable; con-

* This comment is focused on the first volume, which discusses the Justice Department's role in the antitrust area.

¹ See Galbraith, *The New Industrial State*, 1 ANTITRUST LAW & ECON. REV. 11 (Winter, 1967), and the three subsequent articles commenting on Galbraith's position.

² Nader, *Introduction* to THE CLOSED ENTERPRISE SYSTEM: THE NADER STUDY GROUP REPORT ON ANTITRUST ENFORCEMENT at ix (M. Green ed. 1971).

³ Recent publications include: THE CHEMICAL FEAST (J. Turner ed. 1970) (concerning the practice of the Food and Drug Administration); CITIBANK (D. Leindorf ed. 1971) (reviewing New York City's First National Bank's activities); THE INTERSTATE COMMERCE COMMISSION (R. Fellmeth ed. 1970) (discussing the Commission's effectiveness); OLD AGE: THE LAST SEGREGATION (C. Townsend ed. 1970) (concerning the problems of nursing homes); ONE LIFE — ONE PHYSICIAN (R. McClerry ed. 1970) (scrutinizing the medical profession); and VANISHING AIR (J. Esposito ed. 1970) (relating to air pollution problems).

stituency population — and thereby power — grows in proportion to the intensity of antiestablishment condemnation. A debilitating side effect of this is that, as the sweep of the charges grows, so does the difficulty of proof.

The authors rely heavily on technique to cloak the gaps in credibility. The methodology operates on two levels. First, a favorable base of support in the literature is established by selective reference to sources obviously favorable to the attack.⁴ Second, personal interviews — in the pattern of what is labelled “the great . . . oral tradition in the law”⁵ — are exploited in such a manner as to give a taint of objectivity to a cascade of value judgments. Neither method is successful. If anything, slanted technique dramatizes sloppy work.

I

The interview technique proves vulnerable to an obvious indifference to any type of disciplined and systematized program of investigation. The result is an impressionistic mosaic of generalities embellished with journalistic stylisms (“It is rumored,” “an anonymous official [said],” etc.).⁶ Yet an even more critical defect is the inability to effectively connect interview results to meaningful judgments on the enforcement process. Reference to the section of the Report dealing with the impact of “personality” on enforcement and the competency of Antitrust Division staff verifies this deficiency.⁷

Shunning efforts to make and relate detailed findings on education, experience, etc., to possible decision-making patterns, the authors commit 89 pages⁸ to a gossipy discussion of high level Antitrust Division personnel and Attorneys General. What emerges is a collection of banalities (“all of the AAG’s [Assistant Attorneys General] of the past decade have been men of competence and caution”), the obvious (“differences in temperament, ability to arouse morale, and enforcement priorities were evident”), and unsupported

⁴ A glaring lapse is the use of an article by Posner to support a shared monopoly argument. See notes 73-81 *infra* & accompanying text.

⁵ Nader, *supra* note 2, at ix.

⁶ It would be interesting to know what standards (if any) were used in selecting interviewees, the procedures and techniques used in setting up the interrogation process, and the methods used to sift out bias.

⁷ 1 THE CLOSED ENTERPRISE SYSTEM: THE NADER STUDY GROUP REPORT ON ANTITRUST ENFORCEMENT 125-214 (M. Green ed. 1971 [hereinafter cited as 1 ENTERPRISE]).

⁸ *Id.*

value judgments (none of the AAG's mastered "policy planning" or anything about concentration).⁹

The results are no more enlightening when the interview method turns to the question of the "quality" of Antitrust Division lower staff. For example, the statement is made that Division lawyers "often resist the 'new economics.'" ¹⁰ One is left uninformed as to exactly what stands behind the resistance — lack of education or philosophical distaste — and as to the scope of the purported resistance.¹¹ The authors summarize their findings with the conclusion that the staff quality is "mixed." To assist the reader in discovering just what "mixed" means, a potpourri of observations is presented: "Many of the trial staff are indeed extremely able;" "Robert Kennedy always turned to other Justice staff for his personally important cases;" Donald Turner thought that the "trial staff were generally incompetent;" and, finally, "At the least, there is a layer of 'deadwood' or 'fat' in the legal staff."¹²

The lacuna between this veneer of generalities and an interpretive profile of the basic factors bearing on quality and competency of staff is conspicuous. While obviously a difficult task to compile and analyze data bearing on this problem, it is clearly within the authors' self-addressed charge. At a minimum, information on work experience, factors bearing on promotion, and the content of the staff's educational background would be pertinent.¹³ Another serious omission is a failure to develop a profile of the decision makers at the section level, a group of individuals who, on a daily basis, make decisions affecting vast areas of commerce.

Technique also fails when the Raiders endeavor to probe the impact of outside influence on the enforcement process. Accusing the agencies of being participants in realpolitik — "policy based on power rather than ideals"¹⁴ — an effort is made to establish in-

⁹ *Id.* at 209.

¹⁰ *Id.* at 241.

¹¹ Indeed, it could be argued that present antitrust policy has embraced too much of the "new economics." See Austin, *A Priori Mechanical Jurisprudence in Antitrust*, 53 MINN. L. REV. 739 (1969).

¹² 1 ENTERPRISE 234-35.

¹³ In the most widely acclaimed Nader study, E. COX, R. FELLMETH & J. SCHULZ, "THE NADER REPORT" ON THE FEDERAL TRADE COMMISSION (1969), a number of personnel characteristics were considered, including educational background (grades in law school, geographical region), standards for hiring, recruitment policies as to minorities, time in grade or position, and percentages of attorneys in various grades. *Id.* at 130-59 & 225-30. For a critical view of the use of these factors, see Gelhorn, Book Review, 68 MICH. L. REV. 151, 156-57 (1969).

¹⁴ 1 ENTERPRISE 62, quoting from AMERICAN COLLEGE DICTIONARY 1009 (1966).

fluence peddling as a prime contributor to lax enforcement. Surmise, dramatics,¹⁵ innuendo,¹⁶ and a failure to dig up supporting evidence produce an unconvincing and unproductive effort. In many of the instances cited as reflecting "politiking," the enforcement decisions remained fixed. Indeed, the Raiders come close to a flip-flop, or at least confirm that their efforts are more an exercise in gesture than in substantive investigation, by noting that influence peddling occurs in "only a minority of cases."¹⁷

Meaningful insights into the subtleties of external influences on enforcement do not emerge from celebrity interviewing. Every suit could generate extra-court inputs from three sources: the target, the target's competition (immediate and potential), and interested third parties. Each source will seek to advance its position by one or a combination of influence forms: (1) legal arguments, *i.e.*, the economic facts and legal theories relating to the specific charges; (2) policy arguments, *i.e.*, contentions directed to the possible effects on segments of society or on institutions (an example would be the assertion that an intended merger would create new jobs or, conversely, drain important resources from a given locality); and (3) "ethically suspect" or clearly illegal forms of persuasion. This last could include political trade-offs, such as support for the passage of legislation, or blatant bribery.

Dumping all contracts with the enforcement agencies into flip-pant catchword categories like "influence peddling" and "politiking" disregards these distinctions. Discussion of legal arguments can sharpen the issues to the advantage of all concerned. And while generally irrelevant, non-legal information might have a bearing on a close case. It is, therefore, only the third category that is of concern. This form of persuasion is, by the authors' own evaluation, of such infrequent occurrence as to be a minimal factor. On balance, therefore, communication at all levels with enforcement agen-

¹⁵ While visiting the Antitrust Division, the then Governor Kirk of Florida "stationed his state troopers outside the door [purportedly as] a bullying tactic." 1 ENTERPRISE 85. Intimidation of Justice Department officials at 10th and Constitution Avenues — then the home of the late J. Edgar Hoover and the F.B.I. — is difficult to accept.

¹⁶ In discussing Antitrust Division consideration of an impending merger, the authors nonchalantly remark that:

Incriminating stock dealings point out one very likely motivation behind the unusual actions of the Department. A Wall Street client of a prominent Washington law firm has said that the Mudge, Rose law firm sent a message reading "all contingencies are met," when discussing the merger with a block of investors. Our source, a former Antitrust Division official who wishes to remain anonymous, said that "they never would have sent such an encouraging message unless they had inside information." 1 ENTERPRISE 93.

¹⁷ *Id.* at 121.

cies serves an important function and consequently should be encouraged.

Oblivious to pragmatics, *The Closed Enterprise System* recommends "that *all* meetings between businessmen and enforcement officials from the level of Assistant Attorney General on up . . . be made public by those petitioning."¹⁸ To suggest that publicizing access would reach the jugular vein of the influence problem is to compound the superficial with the simplistic. Endeavors to influence by illegal means, a minimal problem by the Raiders' own account, could easily maneuver through or around a registration process. Conversely, sources who have traditionally contributed to enforcement would be hesitant to become a part of the public record. Confronted with the probability that his identity would become known, the informant, a key to uncovering violations like price fixing, would be loath to surface. Likewise, competitors of target companies (especially small firms) would be less likely to present information if it meant, through the Raiders' proposed registration book, forthcoming retaliation.

II

Turbulence from channelling economic theory and the norms of business behavior through loose statutory language has resulted in a stream of baffling decisions. Quick analysis and clear interpretation of antitrust case law is generally difficult and sometimes impossible. Contradictions and loose threads abound. Rarely, if ever, are cases overruled. In the section on banking, a failure by the Raiders to pay heed to these factors leads to a negligent examination of an important problem area.

In support of the assertion that bank merger activity was completely unmolested by the Antitrust Division prior to 1950, the Raiders posit two reasons: first, the "publicly stated" view of an Assistant Attorney General that such mergers were exempt; and second, the simple failure of the Division to act,¹⁹ even though it was foreseeable that Clayton section 7²⁰ applied to banking. Also emphasized is the fact that prior to Donald Turner's appearance at 10th and Constitution Avenues, enforcement as to non-merger activity "was nil, a spotless record of disregard for violations."²¹

¹⁸ *Id.* at 120.

¹⁹ *Id.* at 502.

²⁰ 15 U.S.C. § 18 (1970).

²¹ 1 ENTERPRISE 514.

This is gloss, misleading, and more calculated to conform to predetermined views than reflect reality. Not mentioned are the significant factors that long shielded banking from any antitrust interference and that even today operate to render development of a realistic enforcement policy extremely difficult.²² A maze of regulations, created in response to a range of tensions — fear of insolvency, conflicts between geographical regions, the presence of a pluralistic system of banking, concern over the possible accumulation of capital in the hands of a few — reach nearly every facet of banking. To accommodate this background, much of public regulation sheltered banking from the stresses of open competition,²³ sometimes to the extent that activity violative of the antitrust laws was condoned and encouraged.²⁴

But a competition-softening policy is, as to certain functions, no longer compatible with modern banking imperatives. For one thing, depositor safety, a serious regulatory concern, is now virtually guaranteed through federal insurance. Hence, conservative banking policy to assure liquidity and solvency no longer dominates regulatory thinking. Equally significant has been the emergence of a vigorous competitive urge among bankers, prompting ventures into new banking related fields.²⁵ The one-bank holding company technique has proved to be an effective method for extending operations into nonbanking areas such as real estate, ranching and even the pizza parlor business.²⁶ Finally, there has been a clear shift in philosophy: "It is settled law," Mr. Justice Brennan announced in *Philadelphia National Bank*, "that '[i]mmunity from the antitrust laws is not lightly implied.'"²⁷

Given this background, it is disingenuous to accuse the Anti-trust Division of having ignored blatant violations and to suggest that merger proscription is belated. Even at this point, compelling reasons exist for caution in antitrust intrusion. The industry continues to function within a matrix of regulations that directly and indirectly affect or soften the tone of competition. For example, Regu-

²² See Wallich, *Banks Need More Freedom to Compete*, FORTUNE, March 1970, at 114.

²³ See D. Jacobs, *The Framework of Commercial Bank Regulation: An Appraisal*, in STUDIES IN BANKING COMPETITION AND BANKING STRUCTURE 337, 342-43 (1966).

²⁴ G. FISCHER, AMERICAN BANKING STRUCTURE 247 (1968). See Rose, *Are Those 11,400 Banks Really Necessary*, FORTUNE, Nov. 1970, at 113.

²⁵ Wallich, *supra* note 22, at 143.

²⁶ 116 CONG. REC. 32, 123 (1970).

²⁷ *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 348 (1963), quoting from *California v. FPC*, 369 U.S. 482, 485 (1961).

lation Q²⁸ precludes open price competition for demand deposits and sets maximum price levels for time and savings deposits. Indigenous state branching laws interfere with uniform policy development. Banking conduct, which at first blush appears to violate anti-trust laws, might be justified when analyzed in the full context of the banking process.²⁹ Ignoring critical essentials of the banking process and sidestepping the rigors of a total evaluation of the industry's special characteristics constitutes a cop-out to the velvet-lined groove of visceralized rhetoric.³⁰ The Raiders are also conveniently spared the burden of making meaningful recommendations.³¹

The discussion of the bank holding company issue, a problem of major dimension, is inappropriately cursory. The authors merely note that customers would patronize non-banking affiliates, especially during periods of tight money. Then, in a brief reference, they acknowledge the passage of the Bank Holding Company Act Amendments of 1970.³² Glossed over are the difficult enforcement and detection problems posed by the subtle, but powerful form of leverage that is inherent in the dispensation of credit. It is, for example, highly doubtful whether the per se anti-tying provision of the Bank Holding Company Act³³ can deal effectively with an "independent" decision by a sophisticated customer to insure, by dealing with the bank's affiliates, the present and future satisfaction of his credit needs.³⁴ Also strange, especially in light of the Report's ori-

²⁸ 12 U.S.C. §§ 371(a), (b) (1970).

²⁹ An example is the compensating balance requirement. See Austin & Solomon, *The Antitrust Implications of Compensating Balances*, 58 VA. L. REV. 1 (1972). It is interesting to note that this widespread banking practice, pregnant with potential abuses, received practically no attention in The Nader Raider Citibank study. CITIBANK, *supra* note 3, at 193-97.

³⁰ Some of the lacunae in the discussion are undoubtedly due to the failure to interview Dr. Elinor Solomon, financial economist attached to the Evaluation Section, Antitrust Division, who has extensive experience and background in banking. Such an egregious omission raises serious questions about the authors' over-all interview methodology.

³¹ A likely starting point is the coordination of regulatory policy on a national basis and the establishment of a national industry. See, e.g., Phillips, *Competition, Confusion, and Commercial Banking*, 19 J. FINANCE 32, 45 (March, 1964).

³² Act of Dec. 31, 1970, 84 Stat. 1760 [incorporated within 12 U.S.C. §§ 1841-1978 (1970)].

³³ 12 U.S.C. § 1972 (1970).

³⁴ See Rose, *The Case For the One-Bank Holding Company*, FORTUNE, May 1969, at 163, 332; Note, *The Bank Holding Company Act Amendments of 1970*, 39 GEO. WASH. L. REV. 1200, 1226-27 (1971); Recent Developments, *The Antitrust Laws and One-Bank Holding Companies: Breaking into the Piggy Bank*, 18 CATHOLIC L. REV. 524, 530 (1969).

entation, is the failure to discuss the success of the banking lobby in persuading Congress to "grandfather" substantial industry interests from the effects of the amendments.³⁵

III

The reliability of the *The Closed Enterprise System* is irretrievably dissipated by the authors' management of the oligopoly issue. A fully developed treatment of oligopoly depends upon careful examination of two areas: first, the justification, through demonstration of harmful consequences, for mounting an attack; and second, the existence of a reasonable means to dissolve the anticompetitive pressures. By omitting to set up a competitive frame of reference for ascertaining harmful effects and by laying down a smokescreen of value judgments so as to divert discussion of oligopoly effects away from basic economic indicators, the authors fail to reach the first area. An inability to cut through doctrine and case law obscures treatment of remedies.

Justification for attack. The statement of justification for attack does not include a definitive and pragmatic model of competition — an important preface to any discussion of antitrust. What does appear is a form of pure competition; consumer sovereignty, equilibrium pricing, decentralized markets of many sellers, and an absence of non-price competition are espoused. As an analytical frame of reference, pure competition assumes adherence to an abstracted and static view of competition. In the dynamics of the marketplace, deviations are inevitable. As a result, the competitive model assumed for purposes of developing feasible antitrust policy is determined by the type, degree, and quality of deviations deemed desirable.³⁶ The problem with the presentation by *The Closed Enterprise System* is that there is no effort made to spell out exactly what deviations should be permitted. "Mom and Popism" is eschewed — which, without elaboration, says nothing. The argument is made "for more \$50 million firms and less billion dollar firms."³⁷ Left unexplained, however, is whether such firms would still be bound to the strictures and theoretical imperatives of pure competition. The tone of the discussion — an irrebuttable assumption of supra-competitive pricing in oligopoly markets, harsh condemnation of

³⁵ See M. MINTZ & J. COHEN, *AMERICA, INC.* 210-11 (1971); Anderson, *Lobbyists Weaken Bank Holding Bill*, *The Washington Post*, Sept. 15, 1970, at 21, col. 5.

³⁶ See Bernhard, *Competition in Law and in Economics*, 12 ANTITRUST BULL. 1099 (1967); 1955 ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 315-42.

³⁷ 1 ENTERPRISE 42.

non-price competition such as product differentiation, and conclusory assumptions as to anticompetitive effects of conglomeration — point to a Nader Raider commitment to pure competition, perhaps to the extent of “purifying the marketplace out of the 20th century.”³⁸

Undoubtedly mindful that constituencies are neither built nor maintained on the unexciting, hard-nosed analysis and evaluation of antitrust economics, the Raiders wave the flag of relevancy by expanding coverage to include two sure headline items — pollution and sociopolitical tensions. For example, oligopoly assertedly encourages “indifference” and “hostility” to pollution, the clear implication being that given a perfectly competitive market with no deviations, the environment would quickly take on the trappings of a Garden of Eden.

No space is committed to tracing a clear connection between environmental problems and the structural condition of oligopoly. Indeed, approximately 406 pages later, the difficulties of making such a connection are conceded.³⁹ Likewise, nothing is offered to support the proposition that atomization of market structures would furnish a route out of today's ecological dilemma. The unlikelihood of an even balance of trade-offs suggests that wholesale divestiture would make environmental improvement even more difficult. The stress on resources prompted by atomization would have the immediate effect of pushing ecology off the budget, with no assurance of improved economic performance as a trade-off. To put a twist on the Schumpeterian thesis, it is perhaps reasonable to conclude that the oligopolist, operating from the shelter of a protected profit position, is better equipped than would be the theoretical “perfect” competitor to expend sums on the research and development necessary for quick relief.

Additional hyperbolized effects of oligopoly are fed to the constituency. Expressing concern over Professor Scherer's conclusion that monopoly profits constitute a redistribution of income from the consuming public to the corporation,⁴⁰ the authors ponder over the innermost feelings of the average auto worker when he compares his paltry salary to the \$795,000 yearly income of the Chairman of General Motors. Calamitous consequences are predicted: “One

³⁸ A paraphrase of a comment in context from J. DIRLAM & A. KAHN, *FAIR COMPETITION: THE LAW AND ECONOMICS OF ANTITRUST POLICY* 31 (1954).

³⁹ See note 95 *infra* & accompanying text.

⁴⁰ F. SCHERER, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 408-09 (1970).

wonders how long any society can continue, with extremes of poverty and wealth such as ours, and not invite retaliation by those it economically mistreats."⁴¹ Likewise, the political influence of the ubiquitous oligopolist is extrapolated into an Orwellian scenario where a cartelized business establishment employs McCarthyite tactics to manipulate an oppressed labor force.

A loosely formulated and impassioned fishing expedition into the labyrinth of employee attitudes needlessly detracts from the more pertinent and manageable question of oligopoly economics. Moreover, even on the merits the value judgments are shaky; in the high-paying auto industry, job enrichment is a more volatile issue than wage scales or the salaries of company officers.⁴² Likewise, the possibility of a divestiturized market structure having measurable effects on desirable sociopolitical goals is remote. In the words of a knowledgeable economist:

It is the irrelevance of the social-political objectives to the anti-trust laws that renders so ironical in antitrust decisions, particularly in recent merger decisions, the citations and the talk about a small-business-way of life. Even if the Clayton Act as well as the Sherman Act were given the most drastic, radical, sweeping interpretation that anybody anywhere has even proposed, the impact on the distribution of property, on self employment, on independent centers of initiative rather than employment of the many by the few — all of these would be absolutely zero. Alleged social and political objectives are nothing but a nuisance and a distraction — a red herring drawn across the trail, irrespective of any opinions about the desirability of having a greater amount of self employment and fewer people working at the direction of others.⁴³

Moreover, the introduction of sociopolitical factors shifts the focus to the multi-faceted problem area of overall governmental reform. In this broad frame of reference, conclusions on the political role and the societal impact of business interests must be programmed into the total political process. One could, in a too-brief overview, note that the political clout of business is dampened considerably by the countervailing thrust of organized labor, the farm lobby, plus a myriad of other pressure groups. Any successful alteration of the existing distribution of leverage would require considerably more than an attack on concentration. Professor Bain frames the proper perspective: "Concentrations of political power in big businesses is only one major phrase of concentration of polit-

⁴¹ 1 ENTERPRISE 35.

⁴² Gooding, *Blue-Collar Blues on the Assembly Line*, FORTUNE, July 1970, at 69.

⁴³ Adelman, *An Economist Looks at the Sherman Act*, 27 ABA ANTITRUST SECTION 32 (1965).

ical power generally. Reversion to a more primitive sort of democracy would require much more than just a reduction in business concentration."⁴⁴

The remedies. Whether the result of poor resource allocation, capitulation to political and business pressures, or simply a pervasive mood of bureaucratic oblomovism, the Government's failure to respond to concentration is viewed as being especially reprehensible in light of the existence of "adequate doctrinal props" for mounting a successful attack.⁴⁵ The Raiders' censure fails to rise above its defects; result-oriented myopia induces one-sided evaluation of case law and incomplete reading of secondary source material, culminating in anfractuous presentation of purported "doctrinal props." Referring to "strains" from key decisions, the authors advance their obscurely phrased deconcentration formula: "[T]aken together [these cases] reveal a developing doctrine that (a) monopoly power, (b) common oligopoly behavior and (c) shared monopoly itself may be violative of the antitrust laws."⁴⁶

This is mangled and rough-hewn syntax. The reader must shoulder the difficult burden of relating cited decisions to shifting context so as to ascertain meaning. Apparently the authors are suggesting that the Sherman Act⁴⁷ may be violated by monopoly power maintained over a substantial period of time, or by the uniform behavior of oligopolists, or by the sharing of monopoly power. These are not new concepts, each having provoked commentary and controversy. They have never, however, been presented in such emaciated and unauthoritative form.

*Alcoa*⁴⁸ is said to stand for the proposition that monopoly power preserved over a lengthy period of time, and not the result of patents or economies of scale, is per se illegal. In support of this reading, the authors cite Judge Hand's statement that a vice of the defendant's market power was a capacity to "embrace each new opportunity as it opened, and to face every newcomer with new capacity already geared into a great organization . . . [having the advantage of experience, trade connections and the elite of personnel]"⁴⁹ (bracketed portion not quoted by the authors). Standing alone, this remark persuasively supports the authors' position. It suggests

⁴⁴ J. BAIN, *INDUSTRIAL ORGANIZATION* 92 (2d ed. 1968).

⁴⁵ 1 *ENTERPRISE* 411.

⁴⁶ *Id.* at 418.

⁴⁷ 15 U.S.C. §§ 1-7 (1970).

⁴⁸ *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

⁴⁹ 1 *ENTERPRISE* 415, *quoting from* 148 F.2d at 431.

that exclusionary or even "normal" conduct is irrelevant and that dominant market occupation alone suffices for proscription. The statement is, however, contradicted by another remark of Hand's (and one that the authors apparently assume to be part of the holding) to the effect that an exception to proscription is the monopolist who "may be the survivor out of a group of active competitors, merely by virtue of his superior skill, foresight and industry."⁵⁰ Presumably the exonerating "skill, foresight and industry" would be an important part of meeting newcomers with advantages of experience, trade connections and elite personnel — the very conduct condemned in the other passage.

The clash of these passages, a puzzle to observers,⁵¹ is ignored by the Raiders. Also ignored is *United States v. Grinnell Corp.*,⁵² which might be interpreted to have resolved the conflict in a manner unfavorable to the authors' position. Mr. Justice Douglas said, "[t]he offense of monopoly under section 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."⁵³ Another limitation on the authors' monopoly power theory — also disregarded — is the fact that in *Alcoa* Hand could point to instances of exclusionary conduct obviously part of a design to block out all potential entrants and clearly going beyond "superior skill, foresight and industry." Finally, the authors discount the fact that subsequent decisions have not seen fit to exploit the *Alcoa* case in a way consistent with an interpretation that monopoly power is per se illegal.⁵⁴ That the *Alcoa* decision is more polemic than precedent seems to have general support.⁵⁵ The sum result of the

⁵⁰ 1 ENTERPRISE 415, quoting from 148 F.2d at 430.

⁵¹ See Turner, *The Scope of Antitrust and Other Economic Regulatory Policies*, 82 HARV. L. REV. 1207, 1218 (1969). Turner does not engage in reconciliation. He reads *Alcoa* as permitting the acquisition of power so long as attributable to accident or competitive superiority, but condemning power retained over a substantial period of time. Turner, *supra*, at 1219. He acknowledges that his is not necessarily a conclusive reading: "Judge Hand's opinion . . . comes very close to saying [that monopoly power retained over a substantial period of time can be illegal, subject to unexpired patents and economics of scale]; indeed, perhaps it does." *Id.* at 1217.

⁵² 384 U.S. 563 (1966).

⁵³ *Id.* at 570-71 (1966).

⁵⁴ ABA ANTITRUST DEVELOPMENTS 1955-1968 at 36 (1968).

⁵⁵ See J. DIRLAM & A. KAHN, *supra* note 38, at 58-69; A. NEALE, *THE ANTITRUST LAWS OF THE UNITED STATES OF AMERICA* 112 (2d ed. 1970); F. SCHERER, *supra* note 40, at 463. Bain concludes that proof of some sort of exclusionary conduct, which "may consist entirely or mainly of normal business practices or policies having

Raiders' disinclination to face up to these points is an underdeveloped and flawed presentation of a fundamental component in their de-concentration plan. This unwillingness to meet contra arguments head-on carries over into discussion of both oligopoly behavior and shared monopoly.

Both lawyers and economists are intrigued by the implications of seemingly parallel behavior of oligopolists. To the theorist, mutual interdependence leads to uniform conduct; programmed anticipatory reaction by each oligopolist becomes the single judgment on pricing, advertising, and product differentiation. Hence, where "common oligopoly behavior" is involved, proof of conspiracy or combination is both unnecessary and irrelevant.

Whatever the merits of this argument,⁵⁶ the courts have not, contrary to what the authors suggest, embraced conscious parallelism. Reference to selected passages from *American Tobacco*⁵⁷ cannot turn the holding of that case from reliance on traditional conspiracy doctrine. The *Cement Institute*⁵⁸ case, which the authors also look to for support, is the Supreme Court's strongest feint in the direction of conscious parallelism. The Court, noting the uniformity of the defendants' behavior, commented by way of footnote dictum that a finding of combination is warranted if "there is evidence that persons, with knowledge that concerted action was contemplated and invited, give adherence to and then participate in a scheme."⁵⁹ The marginal nature of this as authority was demonstrated subsequently in *Theatre Enterprises*,⁶⁰ where Mr. Justice Clark remarked that "[c]ircumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; but 'conscious parallelism' has not yet read conspiracy out of the Sherman Act entirely."⁶¹ Mini-

exclusionary effect and inferentially exclusionary purpose," is necessary. J. BAIN, *supra* note 44, at 544. See also D. DEWEY, *MONOPOLY IN ECONOMICS AND LAW* 238-39 (1959).

⁵⁶ For critical views of various oligopoly assumptions see W. BALDWIN, *ANTITRUST AND THE CHANGING CORPORATION* 248-49 (1961); J. CLARK, *COMPETITION AS A DYNAMIC PROCESS* 471-77 (1961); G. HALE & R. HALE, *MARKET POWER: SIZE AND SHAPE UNDER THE SHERMAN ACT* 134-37 (1958); C. HARRISS, *THE AMERICAN ECONOMY: PRINCIPLES, PRACTICES AND POLICIES* 343-46 (rev. ed. 1956); A. KAPLAN, *BIG ENTERPRISE IN A COMPETITIVE SYSTEM* 50-53 (rev. ed. 1964).

⁵⁷ *American Tobacco Co. v. United States*, 328 U.S. 781 (1946).

⁵⁸ *FTC v. Cement Institute*, 333 U.S. 683 (1948).

⁵⁹ *Id.* at 716 n.17.

⁶⁰ *Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537 (1954).

⁶¹ *Id.* at 541.

mizing this language as a "verbal setback,"⁶² as the Raiders do in a footnote, cannot disguise the fact that there is nothing on the record of case law to indicate that Justice Clark's evaluation has been repudiated or revised.⁶³

Shared monopoly, the capstone of the Nader deconcentration strategy,⁶⁴ is considered to be the logical extension of the monopoly per se proscriptive interpretation of *Alcoa*. Where monopoly power is shared by a few large firms, the same proscriptive result is deemed appropriate. There are at least two variants of the doctrine. One version, "pure" shared monopoly, is grounded in unessayed theory which eschews combination and conspiracy. The activities of each oligopolist blends and interacts so as to constitute, in a collective sense, the responsible force in creating the same type of noncompetitive environment as would exist under monopoly. Each oligopolist exercises shared monopoly power within the context of the other's activities. Since each firm contributes and benefits from the total impact of its respective market position, each monopolizes.⁶⁵

A less venturesome approach is to resort to an allegation of combination or conspiracy to monopolize.⁶⁶ The gravamen of the charge remains the same: monopoly power, wielded by sharing and conspiring oligopolists, is susceptible to attack. An important advantage is that a cautious judiciary is more likely to accept a doctrine with familiar underpinnings. Moreover, conspiracy or combination can be established by at least three methods. First, overt conduct or circumstantial evidence of combination might be available.⁶⁷ Second, tacit agreement might be found in decisional interdependence

⁶² 1 ENTERPRISE 418.

⁶³ See ABA ANTITRUST DEVELOPMENTS, *supra* note 54, at 22-23. This is notwithstanding any "new" interpretation put on "combination" in *Albrecht v. Herald Co.*, 390 U.S. 145, 149-50 (1968). See generally Baker, *Combinations and Conspiracies — Is There a Difference?*, 14 ANTITRUST BULL. 71 (1969).

⁶⁴ See letter from Ralph Nader to Emanuel Cellar and Philip Hart, *appearing in* ATRR, Jan. 5, 1971, D-1 (No. 494).

⁶⁵ Levy, *Some Thoughts on "Antitrust Policy" and the Antitrust Community*, 45 MINN. L. REV. 963, 980 (1961); Rahl, *Conspiracy and the Antitrust Laws*, 44 ILL. L. REV. 743, 756-57 (1950).

⁶⁶ Turner's approach is somewhere between these two: he would impose section 2 liability where oligopolists engaged in otherwise "normal" conduct that has exclusionary effects when implemented on an industry-wide basis. As an example, he mentions the industry-wide practice of distributing machines by lease and not by sale; if, in a three-firm oligopoly, only one of the three firms was leasing, justification for condemnation would be difficult. Turner, *supra* note 51, at 1230-31. The FTC apparently followed Turner's rationale in a recently filed proposed complaint. Note, *The Bus Tire Case: The FTC's New Approach to Concentrated Markets*, 17 WAYNE L. REV. 1169 (1971).

⁶⁷ *Eastern States Retail Lumber Dealers' Assn. v. United States*, 234 U.S. 600 (1914).

of oligopolists. Where it is clear that the self-interest of each firm is protected only if parallel behavior emerges, a finding of tacit agreement is justified.⁶⁸ A third possibility is to blend Sherman Section 1⁶⁹ conspiracy pleadings with Sherman Section 2⁷⁰ allegations.⁷¹

Which form of the doctrine appeals most to *The Closed Enterprise System* is hidden in incoherence and unintelligible meanderings. Indeed, the treatment of shared monopoly has been so badly mismanaged as to raise serious doubts as to the authors' ability to engage in the rudiments of basic research. Analytical insights do not emerge from the cryptic comment that "combining *Alcoa* with *American Tobacco* leads [to shared monopoly],"⁷² especially in light of the authors' superficial analysis of these cases. Any possibility of development of rational theory disappears when the authors opt to invoke an article by Professor Posner⁷³ as support for a Turner statement that individual and shared monopoly deserve the same treatment.⁷⁴ *The Closed Enterprise System* says:

Conservative economist Richard Posner agrees. But he anticipates the criticisms that: oligopolists are only behaving as market structure compels them to behave (Ford has to look at GM's prices and raise their own equally if their profits will increase); and that any court decree forbidding such future behavior will therefore be worthless (you can't ask firms to be antirational). Posner responds that oligopoly pricing is *voluntary*, not inevitable. The following practices — the correctable costs of a shared monopoly — are listed by him as justifiably triggering a Sherman Act violation: systematic price discrimination; prolonged excess capacity; refusal to offer discounts during substantial excess capacity; infrequent and identical price changes; very abnormal profits; announcement of price increases far in advance; public statements concerning the "correct price;" fixed market shares for a long period of time; and identical sealed bids on non-standard items. Posner also urges dissolution of the existing oligopoly structure as relief which would help guarantee a return to competitive pricing.⁷⁵

Use of the Posner article is puzzling. The purpose of that piece is to develop a logical doctrine for dealing with non-collusive oligo-

⁶⁸ See *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939).

⁶⁹ 15 U.S.C. § 1 (1970).

⁷⁰ 15 U.S.C. § 2 (1970).

⁷¹ Rostow, *The New Sherman Act: A Positive Instrument of Progress*, 14 U. CHI. L. REV. 567, 585 (1947).

⁷² 1 ENTERPRISE 418.

⁷³ Posner, *Oligopoly and the Antitrust Laws: A Suggested Approach*, 21 STAN. L. REV. 1562 (1969).

⁷⁴ Turner, *supra* note 51, at 1230. Turner thereby rejects his previously stated view in C. KAYSER & D. TURNER, ANTITRUST POLICY 21, 110-11 (1959).

⁷⁵ 1 ENTERPRISE 419-20.

polistic supra-competitive pricing under Section 1 of the Sherman Act. It is a rebuttal to the view that the non-collusive pricing issue "constitutes an economically and legally distinct problem requiring new doctrines and new remedies for its solution."⁷⁶ The practices and conditions listed by Posner would trigger a Section 1 tacit collusion violation,⁷⁷ and not, as the authors imply, a shared monopoly violation. While Sherman Section 1 price conspiracy could be a factor in establishing a shared monopoly by combination or conspiracy, the authors do not establish that context in their reference to Posner's article.

Most significantly, law professor Posner does *not*, in a short three-page tangential discussion of joint monopolization,⁷⁸ set forth any pronouncements that could possibly be construed by the most sanguine Nader Raider as evidencing acceptance of Professor Turner's views on shared monopoly. To the contrary, Posner questions the wisdom of a hard-line *Alcoa* interpretation, remarking that "[e]ven in its original context of single-firm monopoly, the *Alcoa* doctrine seems open to serious question."⁷⁹ When he proceeds to the oligopoly problem, Posner's lack of sympathy for the shared monopoly argument is inescapable: "If the *Alcoa* doctrine seems inappropriate as a solution to the problems raised by single-firm monopoly, it seems doubly inappropriate as applied to oligopoly."⁸⁰

In addition, the impression is given that Posner considers dissolution to be the standard remedy for noncompetitive oligopoly pricing. Posner says: "There may be *extreme* cases where dissolution is the appropriate remedy for convicted tacit colluders because repetition of the offense is difficult to prevent by other means. Ordinarily the conventional remedies should be adequate, but courts should not shrink from employing dissolution in an *exceptional* case."⁸¹

⁷⁶ Posner, *supra* note 73, at 1562. Posner directs his criticisms to Professor Turner's views as reflected in Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655 (1962).

⁷⁷ Posner, *supra* note 73, at 1578-87.

⁷⁸ *Id.* at 1595-98.

⁷⁹ *Id.* at 1596.

⁸⁰ *Id.* at 1597.

⁸¹ *Id.* at 1591 (emphasis added). Even the most cursory reading of the Posner article would uncover his distaste for dissolution: "Furthermore, dissolution . . . is neither the only possible remedy for noncompetitive pricing by oligopolists . . . nor generally the best remedy." *Id.* at 1594. "It follows that antitrust policy should emphasize the prevention of practices by which market power is obtained or exploited, but steer generally clear of radical structural remedies." *Id.* at 1597. "It follows that if my proposal to employ section 1 of the Sherman Act against tacit collusion is rejected as un-

The authors' inability to draft a clear statement of shared monopoly doctrine dramatizes the problems standing in front of its use by the enforcement establishment. Even in a most favorable light, the doctrine is a substantial departure from existing law. There is inexorable stress in taking decisions that have been decided in one context, and extending them to a new context. The formidable authority discounting the likelihood of such an extension cannot be ignored.⁸² The Neal Report succinctly evaluates the present status of shared monopoly by stating that no case has "yet provided a basis for treating as illegal the shared monopoly power of several firms that together possess a predominant share of the market, absent proof of conspiracy among them."⁸³ Moreover, use of shared monopoly suits might have unwelcome side effects. Medium sized firms, fearful of extending market control and thereby provoking shared monopoly attack, might use supracompetitive pricing as a means of curtailing further growth.⁸⁴

Finally, any discussion of the adequacy of the shared monopoly doctrine is incomplete without recognition that its use would entail new and possibly exhausting burdens on trial courts. The fact that courts presently have an uncomfortable time in shifting through the unfamiliar "morass of economic data"⁸⁵ that accompanies every antitrust suit magnifies the significance of new burdens. For example, a considerable portion of time and energy would be occupied with developing an economic basis for making a finding as to the necessary level of combined market shares that would trigger a violation.⁸⁶ Most cases would involve prolonged conflict over the identification of participants in the "sharing;" all cases would pose sticky

feasible, the alternative of applying radical structural remedies in highly concentrated markets should, on the basis of present knowledge, also be rejected." *Id.* at 1598.

⁸² See R. CAVES, *AMERICAN INDUSTRY: STRUCTURE, CONDUCT, PERFORMANCE* 63 (2d ed. 1967); D. DEWEY, *supra* note 55, at 239-56; A. NEALE, *supra* note 55, at 125; Cox, *Competition and Section 2 of the Sherman Act*, 27 ABA ANTITRUST SECTION 72, 85 (1965); Harbeson, *A New Phase of the Antitrust Law*, 45 MICH. L. REV. 977, 985 (1947); Johnston & Stevens, *Monopoly or Monopolization — A Reply to Professor Roslow*, 44 ILL. L. REV. 269 (1949); Kahn, *Standards for Antitrust Policy*, 67 HARV. L. REV. 28 (1953). See also, L. WEISS, *ECONOMICS AND AMERICAN INDUSTRY* 207 (1961).

⁸³ Task Force Report on Antitrust Policy, *reprinted at* 115 CONG. REC. 13890, 13892 (1969).

⁸⁴ Posner raises this possibility in discussing the feasibility of dissolution legislation. Posner, *supra* note 73, at 1595.

⁸⁵ *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295, 343 n.1 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

⁸⁶ J. BAIN, *supra* note 44, at 547.

divestiture problems.⁸⁷ Additional sand in the trial machinery would come from the inevitable shotgun complaint. Since it is unlikely that the government would risk everything on a "pure" shared monopoly suit, the court would be further inundated with the task of wading through evidence dealing with "conduct not honestly industrial" and with evidence supporting inferences of combination.⁸⁸

If analysis of the shared monopoly doctrine is mutilated, presentation of the alternative method of attacking oligopoly — deconcentration by statute — is little more than sterile duplication of the Kaysen-Turner⁸⁹ and Neal Report⁹⁰ recommendations which would atomize oligopolistic market structures by divestiture.⁹¹ The authors are, as one would expect, more severe; they would decree an irrebuttable presumption against an economies defense and would make attack mandatory.

Discussion of support for such a drastic move is cursory and unconvincing. The economic justification — "super(sic)-competitive prices"⁹² is briefly alluded to and recognized as being tentative. The heart of the *raison d'être* for congressional action is thereby permitted to slip past the reader within the space of a few seconds.⁹³ The noneconomic justification — vices such as pollution, inflation, concentration of political power, etc.⁹⁴ — are deflated by the authors themselves who, in a characteristic flip-flop, admit the difficulty of producing any sort of statistical correlation between oligopoly and noneconomic "evils."⁹⁵ Hence, after the Nader Raider verbiage is raked aside, *The Closed Enterprise System's* case for drastic legislative surgery is staked on nothing more than a value

⁸⁷ Turner notes that a lack of symmetry could pose divestiture problems. "Suppose, for example, a three-firm industry in which the market shares are 50, 30, and 20 per cent respectively, and in which maximum economies of sale are reached at around 15 per cent of the market. Divestiture would be appropriate for the larger two firms but not for the smallest." Turner, *supra* note 51, at 1231 n.45.

⁸⁸ This seems to be the FTC's approach in their suit against General Mills, Quaker Oats, Kellogg, and General Foods. See ATRR, Jan. 25, 1972, D-1, (No. 547).

⁸⁹ C. KAYSEN & D. TURNER, *ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS* (1965).

⁹⁰ *Supra* note 83.

⁹¹ Also discussed as an anti-oligopoly weapon is the "sweep-back" doctrine from *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957).

⁹² 1 ENTERPRISE 439.

⁹³ This defect is not cured by referring the reader to the first chapter of the book, *Economics of Antitrust*, which is itself poorly developed. See notes 39-44 *supra* & accompanying text.

⁹⁴ See 1 ENTERPRISE 439.

⁹⁵ *Id.*

judgment that "Bigness (whatever the context and economic configuration) is Bad."⁹⁶

IV

*It has not been done well. It reads like the work of a harassed undergraduate hoping against reason that his senior thesis, compiled in three horrendous nights of scissors, paste and black coffee, will be accepted on grounds that he will not graduate [otherwise]*⁹⁷

The defects in *The Closed Enterprise System* are of sufficient proportion to raise doubts about the capacity of the Center for Study of Responsive Law to effectively allocate resources, or indeed whether they have competent resources to allocate. Much of the material is nothing more than a dilettantish rehash of existing knowledge. The interview method fails to uncover new or significant facts on antitrust enforcement, policy procedure, or personality. Other than a survey of judicial attitudes towards antitrust, the only material not available prior to the release of the report are the Nader Raider self-serving interpretations of doctrine and events. In terms of first level analysis and evaluation there is, in brief, a manifest inability or disinclination to handle the basics of antitrust in candor and with balance. In this respect, *The Closed Enterprise System* justifies the recent concern of Nader supporters that he "is hurting their common cause by speaking out too often on too many subjects and . . . not documenting his arguments adequately."⁹⁸

The report's poor quality has broader implications for the Nader movement. A primary purpose of the Nader reformation is the restructuring of the corporate establishment. Through various techniques ("popularization of the boardroom," for example)⁹⁹ corporate priorities are to be rearranged. Different inputs — pollution, racial inequities, and income distribution — are to be fed into the decision-making process with first priority. In this context, *The Closed Enterprise System* constitutes an effort at justifying the use

⁹⁶ For criticism of the Neal Report recommendations see Brazen, *The Antitrust Task Force Deconcentration Recommendation*, 13 J. LAW & ECON. 279 (1970); Keyes, *The Proposed Concentrated Industries Act: A Critique*, 15 ANTITRUST BULL. 469 (1970); Markham, *Antitrust Policy: Challenge and Defense*, 28 WASH. & LEE L. REV. 287, 303-07 (1971).

⁹⁷ Daniel P. Moynihan made this statement commenting on the UN's Report on the World Social Situation, Wall St. J., Nov. 18, 1971, at 14, col. 5.

⁹⁸ U.S. NEWS AND WORLD REPORT, Nov. 8, 1971, at 12.

⁹⁹ BUSINESS WEEK, Nov. 28, 1970, at 88.

of antitrust enforcement machinery as another vehicle for implementing the Nader reformation.

It is an ineffectual and unsuccessful effort. In 1,148 pages, support for the major premise that the market place, as presently constituted, is the Typhoid Mary of the social and political evils of the day never emerges above the level of rhetoric. Furthermore, *The Closed Enterprise System* fails to demonstrate the appropriateness of using the antitrust enforcement process as a conduit for feeding social and political value judgments into the system. In urging a move away from an economic frame of reference for antitrust decision making, the authors are unequal to the task of providing insights as to how to overcome the present absence of methods and procedures for measuring economic efficiencies against possible social and political benefits.¹⁰⁰

ARTHUR D. AUSTIN*

¹⁰⁰ See Posner, *A Program for the Antitrust Division*, 38 CHI. L. REV. 500 (1971); Bork, *Antitrust in Dubious Battle*, FORTUNE, Sept. 1969, at 103-04.

* Associate Professor of Law, Case Western Reserve University, on temporary leave of absence with the Antitrust Division during part of 1970-71.